

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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PENN ENGINEERING AND  
MANUFACTURING CORP.,

Plaintiff,

v.

DONGGUAN ZHENGMAO PRECISION  
HARDWARE FACTORY,

Defendant.

Case No. 2:18-cv-02079-GMN-EJY

**REPORT AND RECOMMENDATION**

**Re: Plaintiff's Motion for Default Judgment  
and Preliminary Injunction  
(ECF No. 11)**

Before the Court is Plaintiff Penn Engineering and Manufacturing Corp.'s ("Penn") Motion for Default Judgment and Permanent Injunction. ECF No. 11. Defendant Dongguan Zhengmao Precision Hardware Factory did not respond to Plaintiff's Motion. The Court finds as follows.

**I. BACKGROUND**

Plaintiff commenced this action on October 29, 2018, with the filing of a Complaint alleging the following Causes of Action against Defendant: Trademark Infringement, False Designation of Origin, and Trademark Counterfeiting under the Lanham Act, and Common Law Trademark Infringement and Unfair Competition. ECF No. 1. On November 5, 2018, executed summons was returned for Defendant. ECF No. 7. On January 2, 2019, the Clerk of Court entered default against Defendant. ECF No. 9. On June 10, 2020, Plaintiff filed the instant Motion for Default Judgment and Permanent Injunction, which it certifies it served upon Defendant. ECF No. 11 at 21.

**II. DISCUSSION**

Fed R. Civ. P. 55(b) authorizes the Court to enter default judgment when the Clerk of Court previously entered default based upon a defendant's failure to answer and defend. *OCWEN Loan Serv., LLC v. Operture Inc.*, Case No. 2:17-cv-01026-GMN-CWH, 2018 WL 1100904, at \*1 (D. Nev. Feb. 12, 2018). A defendant's default, however, does not automatically entitle Plaintiff "to a court-ordered judgment." *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D. Cal. 2002) (internal citation omitted). Rather, the decision to enter a default judgment is left to the

1 discretion of the district court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam).  
 2 As part of that exercise of discretion, the Ninth Circuit instructs that courts have a duty to ensure  
 3 they have a proper basis for exercising personal jurisdiction over the absent defendant. *In re Tuli*,  
 4 172 F.3d 707, 712 (9th Cir. 1999). This is because a “judgment entered without personal jurisdiction  
 5 over the parties is void. To avoid entering a default judgment that can later be successfully attacked  
 6 as void, the court should determine whether it has the power, i.e., the jurisdiction, to enter the  
 7 judgment in the first place.” *Id.*

8 The Court does not have jurisdiction over a defendant unless the plaintiff properly served the  
 9 defendant under Fed. R. Civ. P. 4. *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*,  
 10 840 F.2d 685, 688 (9th Cir. 1988). Pursuant to Rule 4(h)(1), a foreign corporation may be served in  
 11 the manner prescribed by Rule 4(e)(1) for serving an individual, or by delivering process to “an  
 12 officer, a managing or general agent, or any other agent authorized by appointment or by law to  
 13 receive service of process.”<sup>1</sup> However,

14 service of process is not limited solely to officially designated officers, managing  
 15 agents, or agents appointed by law for the receipt of process. The rules are to be  
 16 applied in a manner that will best effectuate their purpose of giving the defendant  
 17 adequate notice. Thus, the service can be made upon a representative so integrated  
 18 with the organization that he will know what to do with the papers. Generally,  
 service is sufficient when made upon an individual who stands in such a position  
 as to render it fair, reasonable and just to imply the authority on his part to receive  
 service.

19 *Direct Mail Specialists, Inc.*, 840 F.2d at 688 (internal citations and quotation marks omitted).  
 20 “Whether the served individual fits within this category involves a factual inquiry into the person’s  
 21 authority within the corporation.” *Penn Eng’g & Mfg. Corp. v. Shanghai Jingyang Import & Export*  
 22 *Co., Ltd.*, Case No. 2:07-cv-01505-PMP-GWF, 2008 WL 11452324, at \*3 (D. Nev. Apr. 15, 2008)  
 23 (internal citation omitted). Rule 4 is a “flexible rule that should be liberally construed so long as a  
 24 party receives sufficient notice of the complaint.” *Id.* (internal citation omitted). Notwithstanding,  
 25 even if the defendant receives actual notice, the Court lacks jurisdiction over the defendant unless  
 26 the plaintiff substantially complies with Rule 4. *Id.*

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27 <sup>1</sup> Fed. R. Civ. P. 4(e)(1) provides that service may be effected by “following state law for serving a summons in  
 28 an action brought in courts of general jurisdiction in the state where the district court is located or where service is  
 made.” Plaintiff does not contend service was effected under this provision.

1 Here, Plaintiff alleges that it served a copy of the Summons and Complaint personally upon  
2 Defendant's "employee" Bi Xiaobo ("Xiaobo") on October 31, 2018, at the Las Vegas International  
3 Fastener Expo. ECF Nos. 7, 11 at 8. Plaintiff does not allege, or offer any support, which would  
4 allow the Court to reasonably conclude that Xiaobo is an officer, managing agent or agent appointed  
5 by law authorized to accept service of process for Defendant. Plaintiff instead simply concludes that  
6 Xiaobo was Defendant's "employee at the Expo" and that Xiaobo "is a sufficient agent or  
7 representative to serve process upon." ECF No. 11 at 8, citing *Direct Mail Specialists, Inc.*, 840  
8 F.2d at 688.

9 Based on the facts presented, the Court cannot determine whether Xiaobo "stands in such a  
10 position as to render it fair, reasonable and just to imply the authority on his part to receive service"  
11 for Defendant. *Direct Mail Specialists, Inc.*, 840 F.2d at 688; see also *Audio Toys, Inc. v. Smart AV*  
12 *Pty Ltd.*, Case No. C 06-6298 SBA, 2007 WL 1655793, at \*4 (N.D. Cal. June 7, 2007) (plaintiff  
13 failed to establish effective service of process where there was little evidence of the served  
14 individual's role within the organization, although the individual attended a trade show, provided  
15 information materials about the organization's products, and gave away a business card indicating  
16 he was an employee of the organization). In a factually similar case involving the same Plaintiff,  
17 this District Court found Penn did not substantially comply with Rule 4's requirements where it  
18 served process on an individual named Jiang at a Las Vegas trade show. *Penn Eng'g & Mfg. Corp.*,  
19 *supra*, 2008 WL 11452324, at \*4. The plaintiff provided "little evidence" demonstrating that Jiang  
20 was an officer, managing agent, an agent appointed by law for accepting receipt of service of process  
21 or otherwise served in a "role within the organization" other than "the fact that she was seen at a  
22 trade show." *Id.* Plaintiff nonetheless contended it had obtained a business card listing the  
23 defendant's email address for Jiang, observed Jiang wearing the defendant's Chairman and General  
24 Manager Liu's nametag, and claimed Jiang made no effort to communicate to Plaintiff that he was  
25 not Liu. *Id.* at \*\*2, 4. Plaintiff's process server also maintained he addressed "Jiang as Liu and  
26 Jiang responded by looking up." *Id.* at \*4. Despite these allegations, the Court found Plaintiff and  
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1 its process server “took no further steps to verify Jiang’s identity or to ensure Jiang was a person  
2 who properly could accept service on [the defendant’s] behalf,” and therefore granted a motion to  
3 quash service. *Id.*

4 Other than identifying Xiaobo as Defendant’s employee at a trade show, Plaintiff provides  
5 nothing to support the conclusion that Xiaobo had the authority to accept service on Defendant’s  
6 behalf. ECF Nos. 7, 11 at 8 (internal citation omitted). These facts fall far short of the information  
7 necessary to allow the Court to find service was valid. *Penn Eng’g & Mfg. Corp.*, 2008 WL  
8 11452324, at \*4 (internal citation omitted).

9 In light of the foregoing, the Court finds Plaintiff has not sufficiently complied with Fed.  
10 Civ. P. 4’s service-of-process requirements. *Direct Mail Specialists, Inc.*, 840 F.2d at 688. As  
11 “judgment entered without personal jurisdiction over the parties is void,” the Court recommends  
12 Plaintiff’s Motion for Default Judgment be denied without prejudice. *In re Tuli*, 172 F.3d at 712.  
13 The Court further recommends Plaintiff be provided one additional opportunity to serve Defendant  
14 under Rules 4(f) and (h)(2). It is further recommended that Plaintiff be given leave to refile its  
15 Motion after it demonstrates service-of-process was properly attempted on Defendant.

### 16 **III. RECOMMENDATIONS**

17 Accordingly,

18 IT IS HEREBY RECOMMENDED that Plaintiff Penn Engineering and Manufacturing  
19 Corp.’s Motion for Default Judgment and Permanent Injunction (ECF No. 11) be DENIED without  
20 prejudice.

21 IT IS FURTHER RECOMMENDED that Plaintiff be given one additional thirty (30) day  
22 opportunity to serve Defendant Dongguan Zhengmao Precision Hardware Factory in accordance  
23 with Fed. R. Civ. P. 4(f) and (h)(2).

1 IT IS FURTHER RECOMMENDED that Plaintiff be given leave to refile its Motion for  
2 Default Judgment and Permanent Injunction once it demonstrates to the Court service of process  
3 upon Defendant was properly attempted or, if achieved, no responsive pleading was timely filed.

4 DATED THIS 8th day of January, 2021.

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7 ELAYNA J. YOUCHAH  
8 UNITED STATES MAGISTRATE JUDGE  
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10 **NOTICE**

11 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be  
12 in writing and filed with the Clerk of Court within fourteen (14) days. The Supreme Court has held  
13 that the courts of appeal may determine that an appeal has been waived due to the failure to file  
14 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also  
15 held that (1) failure to file objections within the specified time and (2) failure to properly address  
16 and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal  
17 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.  
18 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).  
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